IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Petitioners,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Respondents,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD A. ALBU
MAX W. J. GRAHAM, JR.
LEGAL AID SOCIETY
OF HAWAII
1164 Bishop Street, Suite 1100
Honolulu, Hawaii 96813

BEN HARRY GADDIS
LEGAL AID SOCIETY
OF HAWAII
305 Wailuku Drive
Hilo, Hawaii 96720

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Petitioners,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Respondents,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

PRELIMINARY STATEMENT

In this action native Hawaiians seek review of the Ninth Circuit's denial of a private right of action to remedy breaches of trust by state officials in the administration of the Hawaiian Homes program. Since the filing of the Petition for a Writ of Certiorari this Court has decided several cases dealing with implied rights of action. The recent cases, however, leave open major questions which are raised by the decision of the Ninth Circuit in this action regarding the balancing of the four factors set out in *Cort v. Ash*, 422 U.S. 66 (1975).

In this action the Ninth Circuit expressly found that the federal statute imposing the trust was "intended especially to benefit Native Hawaiians." 588 F.2d 1216, 1223. In *Cannon v. University of Chicago*, 47 U.S.L.W. 4549 (1979), this Court noted that it had never denied a private right of action to an expecially benefitted class except in one unusual case. This case, therefore, raises the question of the proper balancing of the *Cort* factors when members of an especially benefitted class claim a cause of action.

Additionally, the Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice and the Secretary of the Interior through the Office of the Solicitor of the Department of the Interior have recently indicated their disagreement with the opinion of the Ninth Circuit. Contrary to the opinion of the Ninth Circuit, the Interior Department has taken the position that the United States has retained its role as trustee of the Hawaiian Homes program and has made the State of Hawaii its instrument for carrying out the federal trust. See Appendix "A" hereto. In addition, the Department of Justice indicated its disagreement with the

denial of a private right of action to the Hawaiian Homes beneficiaries to enforce that trust. See Appendix "B" hereto. These views establish that the Ninth Circuit improperly applied the third and fourth *Cort* factors to Petitioner's claims.

Finally, this Court's recent decision in *Chapman v. Houston WRO*, 47 U.S.L.W. 4528 (1979), expressly left open the question of whether the "and laws" language of 42 U.S.C. § 1983 provides a remedy for federal statutory, non-constitutional violations when jurisdiction is founded on 28 U.S.C. §1331. That issue is squarely presented in this case because Petitioners specifically complained of deprivations under color of state law of rights guaranteed by the Hawaii Admission Act of 1959.

This Court's recent decisions regarding the implication of a right of action and leaving open the question of an express right of action under the "and laws" language of 42 U.S.C.§1983 plus the recent opinions of two federal agencies regarding this trust for native Hawaiians militate in favor of a grant of the Writ to settle these important questions. Failing a grant of the Writ, at a minimum, this case should be remanded for reconsideration by the Ninth Circuit *en banc* in the light of these significant recent developments.

II.

THIS CASE RAISES THE QUESTION OF THE PROPER BALANCING OF THE FOUR *CORT* FACTORS WHEN THE STATUTE BENEFITS AN ESPECIAL CLASS

During the last term this Court decided several cases dealing with the implication of a private right of action under a federal statute where no private remedy is expressly provided. In *Cannon v. University of Chicago*, 47 U.S.L.W. 4549 (1979) this Court reversed the decision

of the Seventh Circuit, 559 F.2d 1063, upon which the Ninth Circuit relied to deny Petitioners a private right of action in this case. In applying the second *Cort* factor the Ninth Circuit reasoned that since the Hawaii Admission Act reserves to the United States the right to bring suit to remedy a breach of trust, then Congress must have intended that remedy to the exclusive. To reach that result the Ninth Circuit applied the maxim *expressio unius est exclusio alterius* of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), (*Amtrak*), even though recognizing that its application had been criticized in *Cort v. Ash, supra.* In reversing the Seventh Circuit in *Cannon,* this Court undercut even further the application of the *expressio unius* maxim of *Amtrak. See Cannon,* 47 U.S.L.W. at 4557. The Court noted in *Cannon* that, with only one rare exception, it has never denied a private right of action "where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." 47 U.S.L.W. at 4552, n.13.[1] This Court went on to say, regarding the second *Cort* test:

> Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. *Cort, supra,* 422 U.S. at 82 (Emphasis in original). *Cannon,* 47 U.S.L.W. at 4533.

[1] n. 13 in *Cannon* was also cited with approval last term in *Davis v. Passman,* 47 U.S.L.W. 4643 at 4645, n. 10, in which this Court found a cause of action for a constitutional violation.

Thus, in the absence of an explicit purpose to deny native Hawaiians a cause of action, the Ninth Circuit should not have disturbed the District Court's ruling.

In analyzing the second *Cort* factor, the Ninth Circuit noted that in *Cort v. Ash, supra,* this Court had criticized the broad application of the *expressio unius* maxim of *Amtrak* but stated that *Amtrak* still had some viability on this point. However, in *Cannon* the Court held that when an especial class is benefitted, even the existence of administrative remedies does not militate against a private cause of action when the beneficiaries of the statute are not assured "the ability to activate and participate in the administrative process contemplated by the statute." *Cannon,* 47 U.S.L.W. at 5556, n. 41. Footnote 41 also points out the ineffectiveness of a public remedy if the responsible federal agency lacks adequate enforcement resources.[2] Under the circumstances it was error to apply the *expressio unius* maxim for three reasons: (1) the native Hawaiian Petitioners are an especially benefitted class under the Admission Act, (2) they have no ability to invoke or participate in the public enforcement of the Act, and (3) there is a lack of sufficient enforcement resources to guarantee public enforcement.

III.

RECENT AGENCY OPINIONS SHOW THAT THE NINTH CIRCUIT IMPROPERLY APPLIED THE THIRD AND FOURTH *CORT* FACTORS

Recent opinions by the Department of Justice and the Department of the Interior also demonstrate that the Ninth Circuit improperly applied the third and fourth

[2] *See Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 374 (1968) discussed at p. 12 of the Petition for Writ of Certiorari, wherein the Court noted the "staggering problem" for the United States in enforcing its trust obligations to native Americans.

Cort factors. The Ninth Circuit only devoted two paragraphs to the third and fourth factors and based its decision on a false assumption, made without analyzing the issue, that "the Admission Act was intended to transfer complete ownership and responsibility [of the Hawaiian home lands] to Hawaii." In addition the Ninth Circuit stated:

> With Hawaii's admission into the Union, the national government virtually relinquished its control over and interest in the Hawaiian home lands. The problem described in Plaintiff's complaint is essentially a matter of state concern . . . 588 F.2d at 1224.

This assumption is contradicted by the Deputy Solicitor of the Department of the Interior. See Appendix "A" hereto. In an August 27, 1979 letter to the Director of the Western Regional Office of the United States Commission on Civil Rights, Deputy Solicitor Frederick N. Ferguson of the Department of the Interior stated:

> Taken together, the responsibilities of the federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the Act while making the state its instrument for carrying out the trust . . . Appendix A, p. 4.

The Department of Justice has also indicated its disagreement with the Ninth Circuit in this case.[3] The Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice in a letter of August 13, 1979 to the United States Commission on Civil Rights (See Appendix B hereto) stated:

[3]See also *Amicus Curiae* Brief of the United States in the Ninth Circuit Court of Appeals reproduced as Appendix C to the Petition for a Writ of Certiorari in this case.

> It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated. In this respect, we disagree with the Ninth Circuit's decision in *Keaukaha-Panaewa, supra.* App. B at p. 2.

Accordingly, implication of a cause of action in favor of native Hawaiians is consistent with the purposes of the Admission Act. As this Court recognized in *Cannon,* 47 U.S.L.W. at 4556, the opinion of the agency charged with enforcement is entitled to great weight in application of the third *Cort* factor. Because the Ninth Circuit incorrectly assumed that the United States no longer has a trust obligation to native Hawaiians, it improperly applied the third *Cort* factor to conclude that an action in federal court would serve no federal purpose.

Similarly the erroneous assumption that the Hawaiian Homes program is purely a state matter also led to the misapplication of the fourth *Cort* criterion to conclude that Petitioners are complaining about a matter which is essentially a state concern. As stated by the Solicitor for the Interior Department, the United States is the trustee for native Hawaiians and the state is acting as the agent of the United States. Therefore, this is not a matter purely of traditional state concern.

IV.

THIS CASE RAISES THE QUESTION OF THE BREADTH OF THE "AND LAWS" LANGUAGE OF 42 U.S.C. §1983

Last term this Court expressly left open the question of whether persons claiming a deprivation under color of state law of rights and privileges guaranteed by a federal statute have an express cause of action pursuant to 42 U.S.C. §1983 when jurisdiction is based upon 28 U.S.C. §1331. *Chapman v. Houston WRO,* 47 U.S.L.W. 4528 (1979). Petitioners alleged such a deprivation in the jurisdictional allegations of their complaint and they

relied on 28 U.S.C. §1331 as well as §1343(3) and (4) for jurisdiction. As pointed out last term in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 47 U.S.L.W. 4256, 4259, there is no need to even address the question of whether there is an implied private right of action if §1983 is applicable. The question of the breadth of §1983 is obviously of great importance in determining jurisdiction whenever litigants claim a right of action for deprivation of any federal statutory right under color of state law. If this Court finds a cause of action under such circumstances, then the test of *Cort v. Ash*, with all of its problems, will be avoided.

The Ninth Circuit has recently addressed the question left open in *Chapman v. Houston WRO, supra,* in *Tongal v. Usery*, _____ F.2d _____, Nos. 77-2291, 77-3351 decided August 6, 1979, and held that a claim of a deprivation under color of state law of a federal statutory right is proper under 42 U.S.C. §1983. The Ninth Circuit also held in *Tongal* that jurisdiction was proper under 28 U.S.C. §1361, and therefore that §1983 is not co-extensive with 28 U.S.C. §1343. Therefore, this issue is appropriate for review.

V.

CONCLUSION

Since the Ninth Circuit rendered its decision and the native Hawaiians filed their Petition for a Writ of Certiorari in this matter, this Court has rendered a number of major decisions which raise new questions regarding implied rights of action and express rights of action under 42 U.S.C. §1983. The Ninth Circuit held that native Hawaiians are an especially benefitted class under the Hawaii Admission Act which they seek to

enforce, yet the Ninth Circuit denied the native Hawaiians a private right of action, a result which this Court has approved on only one occasion. *See Cannon v. University of Chicago, supra.* This case raises the problem of the proper balancing of the four factors of *Cort v. Ash* when plaintiffs are members of an especially benefitted class. The Court noted last term in *Touche Ross and Co. v. Reddington*, 47 U.S.L.W. 4732 (1979), that the four *Cort* factors are not entitled to equal weight, but gave no guidance for the balancing of such factors when plaintiffs are members of the class especially benefitted under the federal statute.

Since Petitioners also asserted a cause of action under 42 U.S.C. §1983, this Court should now grant the Writ of Certiorari to determine whether the district court had jurisdiction over such a cause of action pursuant to 28 U.S.C. §1331.

Finally, in light of the recent decisions of this Court and the opinions of the Department of the Interior and the Department of Justice asserting a federal trust responsibility to native Hawaiians and urging a private right of action, if this Court does not grant the Writ it should remand this action to the Ninth Circuit for reconsideration *en banc*.

Respectfully submitted,

RONALD A. ALBU
MAX W. J. GRAHAM, JR.
LEGAL AID SOCIETY
OF HAWAII
1164 Bishop Street
Suite 1100
Honolulu, Hawaii 96813

BEN HARRY GADDIS
LEGAL AID SOCIETY
OF HAWAII
305 Wailuku Drive
Hilo, Hawaii 96720

APPENDIX

APPENDIX A

[Seal]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20040

August 27, 1979

Mr. Philip Montez, Director
Western Regional Office
United States Commission on Civil Rights
312 North Spring Street, Room 1015
Los Angeles, CA 90012

Dear Mr. Montez:

The Secretary has asked me to respond to your letter of August 1, 1979, regarding the responsibility of the United States for enforcement of the provisions of the Hawaiian Homes Commission Act, 1920, and the Hawaii Admission Act of 1959 relating to the Hawaiian home lands.

Your first question relates to section 5 of the Hawaii Admission Act, Act of March 18, 1959, Public Law 86-3, §5, 73 Stat. 5, as amended by Act of July 12, 1960, Public Law 86-624, §41, 74 Stat. 422. Under section 5(b) of the act, title to the Hawaiian home lands held by the United States for the benefit and rehabilitation of native Hawaiians under the Hawaiian Homes Commission Act, 1920, was transferred to the state. Under section 5(f) of the act, these lands, as well as the proceeds and income therefrom, are to be held by the state in trust for the betterment of the conditions of native Hawaiians as per the provisions of the Hawaiian Homes Commission

Act, 1920. See *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission,* 588 F. 2d 1216, 1218, n. 2 (9th Cir. 1978) (petition for certiorari filed, No. 78-1539, April 9, 1979, 47 U.S.L.W. 3684). Use of the home lands for any other object "shall constitute a breach of trust for which suit may be brought by the United States." Hawaii Admission Act, §5(f). The answers to your specific questions with respect to these provisions are as follows.

(a) Section 5(f) of the Hawaii Admission Act confers enforcement and litigation authority on the United States. The Department of Justice is responsible for filing and prosecuting litigation on behalf of the United States; the Department of the Interior does not have independent litigation authority. 28 U.S.C. 516 (1976 ed.). With respect to legal matters relating to the powers and duties of the Secretary of the Interior or laws administered by the Department of the Interior, the Office of the Solicitor is responsible for making recommendations to the Department of Justice concerning the initiation of litigation. Although section 5(f) does not expressly refer to the Secretary of the Interior as the officer responsible for enforcing the trust, it is the Department's position that given the Secretary's longstanding involvement with Hawaiian home lands under the Hawaiian Homes Commission Act, 1920, this Department would be responsible for recommending to the Department of Justice that possible breaches of trust be investigated and that litigation to enforce the trust under section 5(f) be initiated where necessary.

(b) The use of the word "may" in section 5(f) suggests that the authority of the United States to prosecute breaches of the trust under this section is discretionary. In the area of the United States'

relationship with Indians and Indian tribes, which may or may not be analogous to the relationship between the United States and native Hawaiians under section 5(f), some courts have suggested that the federal government's trust responsibility requires the United States to sue on behalf of Indians or Indian tribes to protect Indian rights under federal law, or be liable to the Indians for breach of trust for any loss resulting from the failure to sue. See *United States v. Oneida Nation of New York,* 477 F.2d 939 (Ct. Cl. 1973); *Mason v. United States,* 461 F.2d 1364, 1372-73 (Ct. Cl. 1972), *rev'd.,* 412 U.S. 391 (1973); *cf. Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649, 663, n. 16, 665 (D. Me. 1975), *aff'd,* 528 F.2d 370, 375, 379 (1st Cir. 1975). As the potential liability of the United States may be involved, however, the Department cannot take a position on this issue outside the facts of a particular case in which the question is presented.

(c) This Department would recommend prosecution of any breach of trust which it found to be supported by the facts and legally meritorious.

(d) We have been unable to find any instance in which any action has been filed by the United States for breach of trust under section 5(f).

(e) The Ninth Circuit in construing section 5(f) recently stated: ". . . the state is the trustee. . . . * * * The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee." *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra,* 588 F.2d at 1224, n. 7. It is true that the state, rather than the United States, holds title to the Hawaiian home lands for the use and benefit of native Hawaiians, while the United States' trust

responsibility with respect to Indian lands is due in large part to the fact that the United States holds legal title to the land in trust for Indian tribes and individual Indians. Nonetheless, it is the Department's position that the role of the United States under section 5(f) is essentially that of a trustee. Prior to statehood, the United States itself held title to the home lands in trust for native Hawaiians. The terms of that trust were defined by the provisions of the Hawaiian Homes Commission Act, 1920. Although the United States transferred the lands and the responsibility for administering the act to the state under the Admission Act, the Secretary of the Interior retained certain responsibilities, discussed below, which should be considered to be more than merely ministerial or nondiscretionary. The United States further provided that no substantive changes in the act, and thus in the terms of the trust itself, may be made without the consent of Congress and also retained authority to prosecute breaches of the trust. Taken together, the responsibilities of the federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the act while making the state its instrument for carrying out the trust. *Cf.* Act of August 4, 1947, c. 458, §1, 61 Stat. 731, 25 U.S.C. 355 note (1976 ed.); *Springer v. Townsend*, 336 F. 2d 397 (10th Cir. 1964) (state court, in approving, pursuant to federal statute, conveyance of restricted Indian land, acted as federal instrumentality).

Your second question relates to the duties of the Secretary of the Interior under sections 204(1), 204(4), and 212 of the Hawaiian Homes Commission Act, 1920, as amended. Section 204(1) provides that any "available lands" which were under lease on the date of enactment (July 9, 1921) would not become "home lands" until the

lease expired or until the lands were withdrawn from the operation of the lease by the government authorities responsible for public lands. Where such lands were covered by a lease containing a withdrawal clause, the lands could be withdrawn for use as home lands whenever the Commission (now the Department of Hawaiian Home Lands, Haw. Rev. Stat. §26-17) gave notice, with the approval of the Secretary of the Interior, that the lands were needed for the purposes of the act. It is unclear whether any "available lands" which were under lease in 1921 are still under lease. If not, the authority of the Department and the Secretary under this subsection is now obsolete. Under section 204(4), the Department of Hawaiian Home Lands is authorized to exchange title to "available lands" for public lands of equal value in order to consolidate its holdings or better carry out the purposes of the act. This authority is subject, however, to the approval of both the governor of the state and the Secretary of the Interior. Under section 212, the Department of Hawaiian Home Lands is authorized to return "home lands" to the control of the state government, in which case the lands may be held as public lands and disposed of by general lease. All such leases, however, may be terminated if the Department, with the approval of the Secretary of the Interior, gives notice that the leased lands are again required for the purpose of the act. The Secretary's authority under these sections is not merely ministerial or nondiscretionary, but rather calls for independent judgment and must be exercised consistent with the purpose and provisions of the act. The answers to your specific questions with respect to these provisions are as follows.

(a) The Secretary's authority under section 204 and 212 has not been expressly delegated under departmental regulations. In the past, the authority to approve exchange deeds has been exercised either by the Secretary or an Assistant Secretary upon recommendation of the Solicitor. This practice could also be followed under current departmental regulations.

(b) No formal guidelines or procedures have been established to ensure that state activity concerning Hawaiian home lands is approved by the Secretary where required by the act. In the past, the Department has relied upon the appropriate state officials to forward documents requiring secretarial approval to the Department since the Secretary's approval is necessitated only after initial action by the state agencies. However, since it is possible that the state government may have taken actions with respect to home lands in the past without the required approval of the Secretary, see *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra,* consideration will be given to establishing appropriate procedures to ensure that state action is, in the future, submitted for secretarial approval where required under the act.

(c) Departmental records indicate that five exchange deeds have been submitted for approval and approved under section 204(4) of the act since the enactment of the Hawaii Admission Act, as follows:

Three deeds of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on April 9, 1962;

One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Assistant Secretary Carver on June 19, 1962; and

One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on March 16, 1967.

I hope that this information will be helpful to the Commission in its study. If the Department can be of further assistance, please feel free to write Thomas W. Fredericks, Associate Solicitor, Division of Indian Affairs, Department of the Interior, Washington, DC 20240.

Sincerely,

/s/ Frederick N. Ferguson
DEPUTY SOLICITOR

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
Washington, D.C. 20530

[Seal] August 13 1979

Mr. Philip Montez
Regional Office Director
Western Regional Office
United States Commission
on Civil Rights
312 North Spring Street
Los Angeles, California 90012

Dear Mr. Montez:

This is in response to your letter of August 1, 1979, concerning the Hawaii Admission Act of March 18, 1959, 73 Stat. 4, as amended, and the Hawaiian Homes Commission Act of 1920, as amended, 42 Stat. 108. The identical letter has been sent to the Secretary of the Interior.

As your letter points out, section 5(f) of the Admission Act requires that certain lands, including the Hawaiian home lands, conveyed by the United States to the State "... be held as a public trust for the support of the public schools and other public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of the native Hawaiians ... for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use." As noted by the Ninth Circuit,

section 5(f) contains an ambiguity since it arguably provides that the Hawaiian home lands may be used for the same general public purposes as other federal lands conveyed to Hawaii pursuant to the Admission Act. *Keaukaha–Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216, 1218, n. 2 (9th Circuit, 1979). A petition for certiorari is now pending in the Supreme Court. The subsection further provides that: "such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of the said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."

In response to the specific questions raised in your letter, we offer the following:

1a. The Department of Justice would have the exclusive litigation authority if suit were brought by the United States to enforce the trust. The Department of the Interior has no authority to file lawsuits on behalf of the United States. It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated. In this respect, we disagree with the Ninth Circuit's decision in *Keaukaha–Panaewa, supra.*

1b. The authority to initiate litigation is discretionary, rather than mandatory.

1c. If a request is made to the Department of Justice by the Secretary of the Interior to initiate legal action against the State of Hawaii, we would review the request to determine if the case has legal merit and factual support. If we find that a meritorious case exists, we would file an action.

1d. No actions have been filed by the United States.

1e. The State of Hawaii has the responsibility to administer the lands in accordance with the Admission Act and the State's constitution and laws. If the State fails to fulfill this responsibility, the United States is authorized to bring suit to require the State to fulfill its responsibility.

2. The series of questions in Part 2 relate to the function of the Secretary of the Interior. We defer to the Department of the Interior with respect to these issues.

Sincerely,

/s/ James W. Moorman
James W. Moorman
Assistant Attorney General
Land and Natural Resources Division